No. 14329

United States Court of Appeals

For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 14329

United States Court of Appeals

For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

Foreword 1
Ans. Br.—Part I—Sections A and B (pp. 8-13) 2
Ans. Br.—Part I—Section C (pp. 13-16) 5
Ans. Br.—Part II—Section A (pp. 17-22) 9
Ans. Br.—Part II—Section B (pp. 19-21) 11
Ans. Br.—Part II—Section C (pp. 21-22) 12
Ans. Br.—Part III—Sections A and B (pp. 23-38) 13
Ans. Br.—Part III—Section C (pp. 39-42) 16
Ans. Br.—Part III—Section D (pp. 42-45) 18
Conclusion 19
Appendix 21

TABLE OF AUTHORITIES

Cases

Appel v. Muller, 262 N.Y. 278, 186 N.E. 785 4
Atlas Assurance Co., Ltd., v. State, 102 Cal.App.2d 789, 229 P.2d 13 11
Bloom v. Blanck & Gargaro, Inc., 62 Ohio App. 451, 24 N.E.2d 615 16
Bowers v. East Tennessee & W. N. C. R. Co., 144 N.C. 684, 57 S.E. 453 11
Brougham v. Seattle, 194 Wash. 1, 76 P.2d 1013 17
Brown v. United States, 209 F.2d 463 (2d Cir. 1954) 20
City of Dalton v. Anderson, 72 Ga.App. 109, 33 S.E.2d 115 4
Collins v. George, 102 Va. 509, 46 S.E. 684 8
Conrad v. Cascade Timber Co., 166 Wash. 369, 7 P.2d 19 7
Cook v. Seidenverg, 36 Wn.2d 256, 217 P.2d 799 7
Curoe v. Spokane & I. E. R. Co., 32 Idaho 643, 186 Pac. 1101, 37 A.L.R. 923 (1920) 8
Dalehite v. United States, 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) 9, 10, 13, 20
Discargar v. City of Seattle, 25 Wn.2d 306, 171 P.2d 205 .. 7
Doherty v. Oakland Beach Volunteer Fire Co., 70 R.I. 446, 40 Atl.2d 737 16
P. Dougherty Co. v. United States, 97 F.Supp. 287 17

Page

Cases

Eisenkramer v. Eck, 162 Ark. 501, 258 S.W. 368 8
Erickson v. Kongsli, 40 Wn.2d 79, 240 P.2d 1209 7
Farrell v. L. G. De Felice & Son, 132 Conn. 81, 42 Atl.2d 697 16
Galbraith v. Wheeler-Osgood Co., 123 Wash. 229, 212 Pac. 174 19
Harris v. United States, 205 F.2d 765, (C.A. 10) 9, 10
Johnson v. Prange-Guessenhainer Co., 240 Wis. 363, 2 N.W.2d 723 4
Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346, 118 S.E. 521 8
Kleinclaus v. Marin Realty Co., 94 Cal. App.2d 733, 211 P.2d 582 11
Kuehn v. Dix, 42 Wash. 532, 85 Pac. 43 7
Leroy Fibre Co. v. Chi., Mil. & St. P. Ry., 232 U.S. 340 11
Marzotto v. Gay Garment Co., 11 N.J. Super. 368, 78 A.2d 394 4
Mensik v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 323 7
H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 18
Ottman v. Incorporated Village of Rockville Centre, 275 N.Y. 270, 9 N.E.2d 862 16
Paine v. Gamble Stores, Inc., 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 407 4
Prince v. Chehalis Sav. & Loan Assn., 186 Wash. 372, 58 P.2d 290 8
Riley v. Standard Oil Co. of Indiana, 214 Wis. 15, 252 N.W. 183 8
Spokane International Railway Co. v. United States, 72 F.2d 440 (9th Cir. 1934) 8
United States v. Griffith, Gornall & Carman, Inc., 210 F.2d 11 (10th Cir. 1954) 20
United States v. Inmon, 205 F.2d 681 (C.A. 5) 9, 10
United States v. Praylou, 208 F.2d 291 (4th Cir. 1953) 20
United States v. Trubow, 214 F.2d 192 (9th Cir. 1954) 20
United States v. White, 210 F.2d 79 (9th Cir. 1954) 20
Wood & Iverson, Inc., v. Northwest Lumber Co., 138 Wash. 203, 244 Pac. 712 ..... 7, 19

Page

Texts

89 A.L.R. 477 4
17 Am. Jur. 993 2
38 Am. Jur. 827 7
28 C.J.S. 750 2
65 C.J.S. 413 7
Prosser on Torts, p. 264, §39 7
2 Restatement of Torts, §§285, 286 7

Statutes

Washington Statutes

Rem. Rev. Stat. §2523 19
§5818 ..... 5, 6, 7, 9
Am. Rem. 1945 Supp. §5806 19
Am. Rem. Supp. §5807 ..... 5, 6, 9, 11, 21
RCW §76.04 5
§76.04.220 19
§76.04.380 19
§76.04.370 21

Federal Statutes

28 U.S.C. §2680 ..... 1, 19
43 U.S.C. §934 5

Rules

Federal Rules of Civil Procedure, Rule 8(e), (f) and Forms 9, 10 13

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 14329

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

FOREWORD

The organization of this Reply Brief generally conforms to that of the Answering Brief.

The Government's statement of the case is incomplete, and both it and other parts of the Answering Brief contain irrelevant and inaccurate assertions of fact from sources outside the record or which are erroneously claimed by counsel to have been tacitly admitted. Some of those departures are discussed at appropriate places herein. All well-pleaded allegations of the complaint must here be accepted as true, and no deviations therefrom or adverse coloring thereof is permissible upon this challenge to the sufficiency of the complaint (See Op. Br. 13-14). We again urge a full reading of the complaint.

Through their failure to discuss the same, counsel appear to agree that no part of 28 U.S.C. § 2680 is applicable to the case at bar and that no "discretionary function" is involved (Op. Br. 30-35).

ANS. BR.—PART I—SECTIONS A and B (pp. 8-13)

Government counsel assert that the Port Angeles Western Railroad had an easement across government lands, that the Railroad had the responsibility for maintenance of the right of way and that, under the Washington statute, the Railroad had the duty to keep the right of way free of combustible matter. They argue that, by reason of the foregoing, there was no responsibility on the Government to keep the right of way free of combustible matter. Counsel are in error both factually and as to the law.

Paragraph XI of the complaint (R. 11) alleges that "defendant owned,[1] had control of and free and unrestricted access to" the land where the fire started, including the right of way. That allegation must be accepted as true and is highly important.

There was an easement for railroad right of way over government land, but under the allegation it was not of a character that precluded the Government from access and control. The law is well established that the owner of the servient estate has the right to use the land over which an easement is granted to the extent such use does not interfere with the enjoyment of the easement.[2] Eliminating the combustible material from the right of way would not interfere with the enjoyment of the easement and there was nothing to prevent the Government from conforming to the standard of care which the law and statutes of the State of Washington require of a landowner in a forest area.

Section B of Part I is in error when it says that the holder

[1] The printed record erroneously reads "defendant owner had control * * * ."

[2] 17 Am. Jur. 993 at 994, 995, Easements § 96; 28 C.J.S. 750, 751, Easements §§ 72 and 73.

of the servient estate owes no obligation to third parties to make repairs. In the first place, the matter of "repairs" is not involved in this lawsuit. It is a matter of cleaning up land which should have been placed in a non-hazardous condition and of tolerance by the Government of fire-hazardous conditions and practices on its lands when it had a right and even a duty to abate the same. Secondly, the cases cited on page 11 of the Answering Brief deal entirely with rights and obligations as between the owners of the dominant and servient estates. They do not deal with the obligations of the owner of the servient estate to third parties. It does not matter here whether the Government could look to the Port Angeles Western Railroad for indemnity against liabilities incurred by the Government. This suit involves the rights of a third party who was damaged by the negligent condition and practices on Government owned and controlled lands.

If we follow counsel's argument correctly, it is their contention that the owner of timberland could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land simply by granting an easement across that land. That is patently unsound.

The owner of land cannot escape his obligations and duties to maintain it in a safe condition unless he parts with all right of control or access to the land. Generally, by conveying fee title a man no longer has right of access to or control of the land and therefore is not liable for anything which happens after title passes from him. To some degree the same principle applies where property is leased to another. However, even under landlord-tenant rules, if the landlord retains the right of access to the leased premises, he then remains liable for damages to third persons resulting from a dangerous condition of the premises.

Appel v. Muller, 262 N.Y. 278, 186 N.E. 785;

Paine v. Gamble Stores, Inc., 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 407;

Johnson v. Prange-Guessenhainer Co., 240 Wis. 363 2 N.W.2d 723;

City of Dalton v. Anderson, 72 Ga. App. 109, 33 S.E.2d 115;

Marzotto v. Gay Garment Co., 11 N.J. Super. 368 78 A.2d 394;

See also the annotation in 89 A.L.R. 477.

Since the owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement, it follows, with even greater force than in the landlord-tenant situation, that such landowner is liable for damage resulting from an unlawful and hazardous condition of the land. It does not matter whether the land was in that condition when the Government acquired title thereto nor whether the condition was created by the holder of the easement. The Government, as owner, accepted responsibility for the condition of the land when it accepted title thereto; and regardless of its rights against the Railroad, the Government, as owner of the fee, is still responsible for the results of its condition.

The foregoing principles of law are not the only basis on which we have alleged that the Government had control of and access to the right of way and adjoining lands. There are further facts which, under the allegations of the complaint, we can and would be entitled to establish. But regardless of the additional facts, it is clear, as a matter of law, that the existence of an easement over the Government lands does not relieve the Government of its obligations as a landowner.

(If it makes any difference in this case counsel erroneously state that the easement was granted by the United States pursuant to the Right of Way Act, March 3, 1875, 18 Stat. 482, 43 U.S.C. 934. That statement is outside the record, is erroneous in fact and is contrary to the allegations of the complaint. We are prepared to prove that such right of way as existed was granted years ago by a private party, the then owner of the right of way area and adjoining lands, to another private party, that the United States thereafter acquired the servient estate and adjoining lands in an exchange transaction with the private owner, and that still other agreements and relationships between the Government and the Railroad gave the Government access and control.)

ANS. BR.—PART I—SECTION C (pp. 13-16)

Government counsel challenge the applicability of Rem. Rev. Stat. §§ 5818 and 5807, brushing off § 5818 with the passing comment that that statute requires an act and since there was no act involved in the existence of the fire-hazardous conditions the statute is inapplicable. They say that § 5807 drastically changes the common law, that it is a criminal statute and therefore can have no bearing on this case.

To recognize properly the status of these two statutes one must take into account the importance of the timber industry in the State of Washington and the public policy in this state as declared by the legislature in the numerous statutes designed to protect its timber resources. A reading of RCW, Chapter 76.04, many of the sections of which are set forth in Appendix B of our Opening Brief, and of the cases cited in our Opening Brief and in this brief relating to forest fires, will make clear the concern which both the legislature and the courts of this state have for the safety of Washington's

greatest natural resource. Private parties and both the state and federal government own extensive timber. Some areas are even more vulnerable to fire than others due to topography, weather conditions and the hazardous situations which can be created by improper clearing and logging operations and forestry practices. When weighed in the light of those considerations and having in mind that private, state and federal timber are intermingled, it is clear that the statutes in question are designed to establish a standard of conduct and to protect the interests of all timber owners.

When § 5818 says "It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire," the phrase "do any act" is plainly synonymous with the phrase "to be guilty of any conduct" and must also include omissions. To adopt counsel's argument would mean that it is no crime to build a bonfire but the offense occurs only when the torch is set to it. In the case at bar, the bonfire was all stacked and ready to go on the government-owned right of way and adjoining lands. It was permitted to remain there in the face of long-continued operation of defective railroad equipment known to be capable of starting a fire at any time in dry weather.

Section 5807 and its predecessors have been on the statute books since 1917. While amended several times, this statute has continuously stated that land covered in whole or in part by inflammable debris likely to further the spread of fire is a fire hazard. Whether that is a criminal statute or not, it nevertheless establishes a standard of care, failure to conform to which is negligence.

It is well established that conduct which violates such a statute may be negligent conduct in itself if: (a) the plaintiff

is one of a class of persons whom the statute was intended to protect; and (b) the harm which has occurred is of the type which the statute was intended to prevent and (c) if all of the other elements of tort are present. See Prosser on Torts, § 39, p. 264; 2 Restatement of Torts, §§ 285 and 286; 38 Am. Jur. 827; 65 C.J.S. 413, *et seq.; Discargar v. City of Seattle,* 25 Wn.2d 306, 171 P.2d 205; *Erickson v. Kongsli,* 40 Wn.2d 79, 240 P.2d 1209; *Cook v. Seidenverg,* 36 Wn.2d 256, 217 P.2d 799. Violations of forestry statutes of this state have repeatedly been held proper grounds for civil relief. See *Kuehn v. Dix,* 42 Wash. 532, 85 Pac. 43; *Wood & Iverson, Inc. v. Northwest Lumber Co.,* 138 Wash. 203, 244 Pac. 712; *Mensik v. Cascade Timber Co.,* 144 Wash. 528, 258 Pac. 323; *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P.2d 19.

It is also significant that in its earlier versions § 5807 required that the fire hazard be abated by the owner ***or*** person responsible for the existence of the hazard, but that in 1929 and subsequent versions the statute was amended to require that both the owner ***and*** the person responsible for the existence of the hazard be required to abate the same. Legislative intent to make the owner of the servient estate responsible could not be more clearly stated.

It is clear that §§ 5818 and 5807 are applicable because appellant, as owner of timber which was jeopardized by the fire hazard, is one of a class of persons whom the statute was intended to protect; because the statute was designed to prevent fires and the spread thereof; and because all of the other elements of a tort are present.

This Court has recognized that violation of a statute may be the basis for civil liability even though criminal penalties

attach to the violation. In *Spokane International Railway Co. v. United States,* 72 F.2d 440 (9th Cir. 1934), the defendant railroad was held liable for damages resulting from fire caused by its passing train. The court said at p. 442:

> "(4-6) We come then to the effect of the Idaho statute which required defendant to keep its right of way 'clear and free from all combustible and inflammable material, matter or substances,' during the closed season from June 1st to September 1st. This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another. If the fire originated on defendant's right of way in inflammable material, which in violation of the statute had been allowed to accumulate there, it would be immaterial whether a spark from defendant's engine or the act of a third person from without defendant's right of way had caused the fire. *Curoe v. Spokane & I.E.R. Co.,* 32 Idaho, 643, 186 P. 1101, 37 A.L.R. 923 (1920). On the other hand, even though the fire was set by a spark from defendant's engine, if it ignited material lying outside of the right of way, negligence in failing to maintain the right of way in accordance with the statute would be immaterial unless such failure contributed to the spread of the fire."

Apart from the statute cited, property owners have been held liable for accumulations of combustibles of various types on their premises under common law. *Prince v. Chehalis Sav. & Loan Assn.,* 186 Wash. 372, 58 P.2d 290; *Collins v. George,* 102 Va. 509, 46 S.E. 684; *Riley v. Standard Oil Co. of Indiana,* 214 Wis. 15, 252 N.W. 183; *Eisenkramer v. Eck,* 162 Ark. 501, 258 S.W. 368; *Keyser Canning Co. v. Klots Throwing Co.,* 94 W. Va. 346, 118 S.E. 521.

Counsel say it would be unreasonable to impose responsi-

bility for the condition of the land in perpetuity. The answer to that is twofold. First, the timber which the statute is designed to protect is a resource which the legislature wishes to maintain and protect in perpetuity. Second, there are statutory procedures by which a property owner can dispose of the fire hazard and obtain clearance, thus relieving himself of the responsibility.

ANS. BR.—PART II—SECTION A (pp. 17-22)

Counsel attempt to characterize appellant's case as one based upon the theory of absolute liability without fault, and then cite the case of *Dalehite v. United States*[3] and subse-

Act does not subject the Government to liability without fault. Again, counsel are in error.

The *Dalehite case* and the Court of Appeals cases[4] cited on page 19 of the Answering Brief involved damages which were caused by inherently dangerous articles. In each of those cases the court found that there was no negligence on the part of government employees. We do not contend that the combustible matter on the government lands was an inherently dangerous commodity or that the Government is liable without fault. Our case is one of claimed liability *with* fault, based upon negligence.

Sections 5807 and 5818 establish standards of care for landowners practically identical to the standards of care required by common law.[5] Failure to conform to those standards constitutes negligence.

---

[3] 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).
quent cases, in which the court has ruled that the Tort Claims

[4] *United States v. Inmon,* 205 F.2d 681, 684 (C.A. 5); *Harris v. United States,* 205 F.2d 765, 767 (C.A. 10).

[5] See cases cited on p. 8, *supra.*

Government counsel confuse "negligence per se" with "absolute liability without fault." There is a vital difference and the Court should not fail to differentiate the two theories. In the three cases cited by counsel, if negligence had been present in the handling of the inherently dangerous articles then the Government would have been liable. In the *Dalehite* case, if the explosive fertilizer had been negligently exposed to flame and an explosion followed, the Government would have been liable. In the *Inmon* case, if the Government had failed to make an effort to clean up the old firing range and dispose of dud shells, or had failed to fence and post signs around the area, thus being negligent, the Government would have been liable. In the *Harris* case, if the government employees had negligently flown over the adjacent farmlands and sprayed the herbicide directly on those crops, the Government would have been liable. However, in each of those cases, the court expressly found no negligence existed.

In the case at bar, the slash and debris on the government property was not in itself inherently dangerous. It took something more to make that debris spring into flame and cause the damage complained of. The inflammable material both on the right of way and on the adjoining lands could have been disposed of by the Forest Service employees under conditions which would have prevented any possibility of it causing damage. The Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the Railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire on those lands would imperil and might spread to the forests in the vicinity; and had the power to prevent both the fire-hazardous con-

dition and the fire-hazardous practices. Yet they failed to do so. That was negligence. The common law, as well as the public policy of the State of Washington, as expressed by the legislature in §§5807 and 5818, are to the effect that in forested areas where fire can do extensive damage it is negligence to permit the accumulation of inflammable material. Failure to abate that condition and to prevent the hazardous practices was negligent omission.

If the classic mail-truck driver knowingly drove a mail truck with defective brakes in heavy traffic and, being unable to stop, damaged someone, certainly the Government would be liable. Such action would be contrary to a criminal statute which established a standard of care, and would involve an article not inherently dangerous but which is negligently exposed to a situation which could cause damage. The same principles apply to the case at bar.

ANS. BR.—PART II—SECTION B (pp. 19-21)

Government counsel cite four cases[6] to the effect that the owner of land adjoining a railroad right of way need not conform the use of his land to guard against the negligence of the railroad. Those cases are inapplicable to the case at bar.

The *Bowers* case affirmed a non-suit and assumed, without deciding, that the defendant had been negligent, but determined that proximate cause had not been established.

---

[6] *Bowers v. East Tennessee & W.N.C.R. Co.*, 144 N.C. 684, 57 S.E. 453;
Leroy Fibre Co. v. Chi., Mil., & St. P. Ry., 232 U.S. 340;
Atlas Assurance Co. Ltd. v. State, 102 Cal. App.2d 789, 229 P.2d 13, 17, 19;
Kleinclaus v. Marin Realty Co., 94 Cal. App.2d 733, 211 P.2d 582, 583-584.

The other three cases hold the defendant railroads liable for damages suffered by the adjacent landowners from fires originating on the railroad right of way. Each case holds that the plaintiff was not guilty of contributory negligence and found that the plaintiff in each case was using his land adjacent to the railroad in a proper and lawful manner.

In the case at bar the Government's land adjacent to the railroad was maintained in an improper, sub-standard and fire-hazardous condition, contrary to the law of the state. Furthermore, the Government owned, had control of and access to the railroad right of way upon which similar improper conditions existed. Also, the Government had the right and power to abate the fire-hazardous conditions and practices on the right of way, a circumstance which was not present in the four cases cited. In the cases cited the negligent acts of the railroads were isolated and non-recurring acts which the adjoining landowners were not required to anticipate. In the case at bar there was a long-standing fire-hazardous condition on the right of way and on the Government's adjacent land, and the negligent practices of the railroad had continued for a long time prior to the fire, all of which facts were known to the Forest Service employees.

ANS.BR.—PART II—SECTION C (pp. 21-22)

Government counsel suggest that there is no causal connection between the negligence complained of and the damage sustained. This we are unable to follow. See the complaint and particularly paragraph XI (R. 11-12) and paragraphs XXXV, XXXVI and XXXVIII (R. 26-29). The complaint alleges a continuous related chain of circumstances and events for which the Government is accountable commencing

long prior to the fire on August 6th and continuing until the breakaway of the big fire on September 20th.

Proximate cause is sufficiently alleged under Federal Rules of Civil Procedure, Rules 8(e) and 8(f) and Forms 9 and 10.

ANS. BR.—PART III—SECTIONS A and B (pp. 23-38)

The Government characterizes all of the acts and omissions that occurred on or after August 6, 1951, as fire fighting activities done in the performance of a public function which is clothed with sovereign immunity under the Federal Tort Claims Act as interpreted by the *Dalehite* case.

Pages 23 to 29 of appellee's brief are devoted to a rather fuzzy theory that appellee's lands and employees were dedicated to public benefit and service and for that reason, alone, the Government should not be liable. Throughout the brief the reader is conditioned by repeated use of the word "public," e.g., "public function," "public activities," "public responsibilities," "public character," "public officers," "public firemen," "public domain," "public duty," "public bodies," "public forests," "public at large," "public land" and "public nature of fire fighting endeavors."

The Court should not be misled by any such conditioning process from the real inquiry as to whether the negligence alleged falls within any exception to the statutory waiver of sovereign immunity and whether a private individual under like circumstances would be liable.

In an effort to create an immunized status for the National Forests and the Forest Service, appellee recounts their establishment and development. What it says there could also be said of Rayonier and of many other companies in the timber industry. Rayonier, too, has established forests, is interested

and active in conservation, timber management, continuous supplies of timber, protection against destruction by fire and depredation upon its forests, etc., etc. Rayonier has its own Forest Service, which also has a record of growth and reorganization and which has been headed by men interested in conservation. Rayonier call its Forest Service its "Timber Division." Its functions are the same as those of the United States Forest Service. It protects against fire, but like the Forest Service it does not maintain a fire department. Some of Rayonier's foresters and engineers are also State Fire Wardens, which is useful because that status gives them *authority* to prevent improper practices and meet emergencies on Rayonier's lands. And, like the Forest Service Rangers, Rayonier's Timber Division employees handle acquisitions and sales, road construction, logging, supervision of hunters, fishermen and recreationists, and carrying out of conservation, harvesting and reforestation of timberlands. The complaint alleges these facts in substance.

The point of all this is that the United States owns and administers property for the same purposes and in the same fashion as Rayonier and other private industries and its Forest Service employees have the same jobs and duties as employees of Rayonier and other private timber operators. That the public, i.e., the citizens of the United States, benefit therefrom or enjoy the fruits of this activity is immaterial. The Government, engaging in this activity, is liable for the negligence of its employees, just as are private parties, who could be and sometimes are performing the identical acts.

Counsel's argument ignores: (a) the duty of the Government as a landowner; (b) the fact that the Forest Service's purpose is to administer *Government* lands and to protect

those lands—not the lands of other people—from fire and depredation, and (c) the duty of the Forest Service to co-operate with other timber owners in order to conserve *Government* property which can best be accomplished by reciprocal aid and by action for mutual and common benefit.

Government counsel concede liability if a Government vehicle is negligently driven, even if engaged in fire fighting.[7] Apparently counsel believe that the public function so traditionally exempt ceases at the squirting of water on the blaze. If some part of active participation in fire fighting activities can give rise to liability, why cannot negligent non-activity also be a basis for claim? Is it a public function to permit fire-hazardous conditions and practices on Government lands or to assume supervision of fire fighting and then sit idly by for forty days and let a smoldering fire jeopardize millions of dollars worth of Government and private timber?

Forest Service employees were hired to look after the property of their employer. They were not hired for the benefit of the "public at large," as that expression is used with reference to a municipal fire department. Their functions and duties revolve entirely around the protection and administration of Government owned lands and timber, just as private employees protect and administer private property. Again, as pointed out (Op. Br. 58-59), if it had not been the Forest Service which committed itself to take charge in case of fire it could have been Rayonier or some other company or association of private timber owners which undertook that responsibility.

---

[7] See Ans. Br. p. 38, footnote 29.

ANS.BR.—PART III—SECTION C (pp. 39-42)

Government counsel urge that the Forest Service employees were, in effect, acting as agents of the State in fighting the fire, that as such agents they were performing a public function and that they are therefore entitled to the benefits of the sovereign immunity of the State. This argument is unsound for several reasons.

The State has not waived its sovereign immunity, whereas the Federal Government has. The Federal Government cannot vicariously clothe itself with the immunity of the State. The F.T.C.A. says the Government shall be liable in the same manner as a private individual (not in the same manner as a state or other sovereign), under like circumstances. A private individual could have been party to a contract with the State similar to that made by the Forest Service.

A private party performing fire fighting services for the public at large, either independently or under contract with the municipality in which it operates, is liable for its negligence while engaged in fire fighting activities. *Farrell v. L. G. De Felice & Son,* 132 Conn. 81, 42 Atl.2d 697; *Doherty v. Oakland Beach Volunteer Fire Co.,* 70 R.I. 446, 40 Atl.2d 737; *Ottman v. Incorporated Village of Rockville Centre,* 275 N.Y. 270, 9 N.E.2d 862. See also *Bloom v. Blanck & Gargaro, Inc.,* 62 Ohio App. 451, 24 N.E.2d 615, wherein the city's independent contractor performing sewer construction work, a governmental function, was held liable for its negligence while at the same time the city was held immune from liability. The court said that the immunity of the city does not extend to the contractor. Similarly, the Washington Supreme Court has held a municipal corporation of this state immune from liability for negligent acts of its

officials performing a governmental function, but held the officials personally liable for their negligent conduct in office. *Brougham v. Seattle,* 194 Wash. 1, 76 P.2d 1013.

The Forest Service employees were not agents of the State. They were acting as Forest Service employees for the protection and administration of Forest Service timber. Deputization of some Forest Service employees as state forest wardens was a matter of convenience to give them additional authority by which to perform their duties to their employer. In this respect they were no different than many employees of private timber owners.

Counsel fail to refer to paragraph 9 of the Cooperative Agreement (R. 7) which expressly preserves to private persons their rights to recover damages on account of fires resulting from any negligent act of a forest landowner or a timber operator within the Protective Area and any other rights of similar nature under Washington, federal or general law (Op. Br. pp. 23-25).

While disclaiming any intent to extend the principles of municipal immunity to the Federal Tort Claims Act, counsel cite four cases on page 40 of their brief, based wholly upon municipal immunity from negligence of municipally employed firemen. They are obviously inapplicable.

In footnote 31 on page 42 of the Answering Brief, counsel note our failure to call to the attention of the court reversal of the District Court decision in *P. Dougherty Co. v. United States,* 97 F.Supp. 287, which we cited on page 20 of our Opening Brief. We regret the oversight, but the principle announced in the District Court opinion and the quotation therefrom which appears in our brief is still good law. The *Dougherty* case was reversed by the Court of Appeals but on

other grounds. The majority opinion does not disavow the principle that the Government may be liable as a volunteer. The two judges who did comment on liability of a volunteer as being pertinent to the decision vigorously and emphatically approved the principle stated by the District Judge.

Counsel make much of the case of *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y.160, 159 N.E. 896. Counsel seem to miss the point made by us (Op. Br. pp. 23-25). We do not sue on the Cooperative Agreement. Rather we point to that contract as establishing a duty on the Forest Service, breach of which was negligence.

The *Moch* case expressly by-passed a very imporant question present in the case at bar. The court said, page 899:

> "We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen."

By failing to use sufficient available men and equipment and by doing practically nothing for forty days while the smoldering area continued to imperil nearby timber, the Forest Service employees manifested reckless and wanton indifference to consequences measured and foreseen.

ANS. BR.—PART III—SECTION D (pp. 42-45)

Counsel seek to divorce the Government from its identity as owner of land upon which fire originated and from which the fire spread, and from its identity as an actor supervising fire fighting. They also characterize the Forest Service employees as the equivalent of a municipal fire department established for the sole purpose of fighting fires for the benefit of the public at large. Since counsel's argument is premised upon assumptions contrary to the facts in the case at bar, it is pointless.

The true question is whether a private individual standing in the place of the Government under all of the facts and circumstances of this case, would be liable. The answer is yes, as we have demonstrated.

It is pertinent that the Washington Supreme Court has held the owner of land on which fire occurs is liable for improper fire fighting, even though it is done on his behalf by state fire wardens. *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174; *Wood & Iverson, Inc. v. Northwest Lumber Co.,* 138 Wash. 203, 244 Pac. 712. The landowner must guard and extinguish the fire, and he is not relieved of his responsibility just because he employs a state fire warden to do the work.

Also pertinent are two other state statutes, Rem. Rev. Stat. §2523, RCW 76.04.220, which imposes the duty upon every person carefully to guard or to extinguish any fire, whether on his own land or on the land of another; and Am. Rem. Supp. 1945 §5806, RCW 76.04.380, which provides that the owner, operator or person in possession of land on which a fire exists or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other land, is duty bound to make every reasonable effort to control and to extinguish such fire immediately after receiving notice to do so. Here the Forest Service had immediate personal notice.

CONCLUSION

The Tort Claims Act does not retain immunity from liability for negligence in the performance of a "public function" as such. 28 U.S.C. §2680 specifically describes several functions which are public or governmental where immunity is

expressly retained. It follows by necessary implication that immunity is waived as to all other functions which might be characterized as public or governmental. This construction of the Act has repeatedly been recognized by the courts holding the Government liable for torts committed in the exercise of "public functions" (See Op. Br. pp. 39-40). Recent post-*Dalehite* decisions have held the Government liable for negligence related to public functions: *United States v. Praylou,* 208 F.2d 291 (4th Cir. 1953), involved a crash of a government plane operated by government employees on government business; *Brown v. United States,* 209 F.2d 463 (2d Cir. 1954), veterans' hospital case involving malpractice; *United States v. Griffith, Gornall & Carman, Inc.,* 210 F.2d 11 (10th Cir. 1954), military airfield negligently drained caused damage to nearby landowner; *United States v. White,* 210 F.2d 79 (9th Cir. 1954), negligence toward business invitee on deactivated firing range; *United States v. Trubow,* 214 F.2d 192 (9th Cir. 1954), defective condition of elevator door in Marine Hospital in San Francisco.

The order appealed from should be reversed.

Respectfully submitted,

HOLMAN, MICKELWAIT, MARION.
BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

APPENDIX

We have noted an error in the reproduction of Rem. Rev. Stat. §5807; R.C.W. 76.04.370 on pages 22 and 72 of our Opening Brief. The present form of this statute is set forth below and appears also on page 48 of the Government's answering brief. We regret the error. It occurred as the result of confusion in copying due to the several amendments and due to the interchange as between Remington's Revised Statutes and the Revised Code of Washington. The legislative history of §5807 is as follows:

Laws of 1917, Section 4 of chap. 105, p. 349 at 351;
Laws of 1921, Section 2 of chap. 64, p. 196 at 198;
Laws of 1929, Section 1 of chap. 134, pp. 351 and 352;
Laws of 1939, Section 1 of chap. 58, pp. 171 and 172; and
Laws of 1951, Section 1 of chap. 235, pp. 742 and 743.

Those parts of the Statute which are important to the case at bar have remained substantially in the same form since 1917 in all of its amended versions.

Am. Rev. Supp §5807; R.C.W. 76.04.370.

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien.

Nothing in this section shall apply to land for which a certificate of clearance has been issued.

"If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence." Laws of 1951, Section 1 of chap. 235, pp. 742 and 743.